**PUBLIC PROSECUTOR**

**v.**

**TENG CHEN CHOI**

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[ARREST CASE NO. C317/1984]
22 AUGUST 1988

***CRIMINAL PROCEDURE:*** *Circumstances in which a statement made by an accused person may be used in his cross examination and for the purpose of impeaching his credit.*

The accused was facing a charge of murder. While in custody a statement was recorded from him. At the preliminary inquiry the prosecution put the statement in evidence. In the High Court the prosecution did not have the accused's statement admitted in evidence as part of its case. When the prosecution closed its case the recording officer was made available to the defence. In the cause of his cross-examination the prosecution sought to use the statement to impeach his credit. Defence Counsel objected on the ground that since the prosecution had already closed its case it could not now call the recording officer to put the statement in.

**Held:**

**[1]** it was not open to the prosecution to do this for the following reasons:

(a) the critical words of s. 113(1) is quite clear. If the prosecution wish to rely upon the statement as evidence they must have the statement admitted as part of their case.

(b) to allow the prosecution to utilise the statement for the first time, half way through the cross-examination without the Court being satisfied whether the statement was made voluntarily and made by a person after his arrest, that a caution in the statutory form was administered to him, would be to defeat s. 113 of the Criminal Procedure Code.

(c) to allow the prosecution to initiate a trial within a trial to determine the admissibility of the statement notwithstanding that they have closed their case would be to allow them to reopen their case after they have closed it in order to put the statement in evidence as a prosecution exhibit. Inevitably they will have to call the recording officer to give evidence as a witness for the prosecution

*[Special Provisions of s. 113 of the CPC must be strictly adhered to.]*

**Cases referred to:**
*PP v. Mohd. Noor Bin Jantan [1979] 2 MLJ 289*
*Krishnan & Anor. v. PP [1982] CLJ (Rep) 152*
*PP v. Samsul Kamar bin Mohd Zain [1988] 2 CLJ (Rep) 310*

**Legislation referred to:**
Criminal Procedure Code, s. 113
Evidence Act 1950, s. 145

*For the accused - Saraswathy Devi*
*For the public prosecutor - Siti Zainab*

**JUDGMENT**

**Mahadev Shankar J:**

The issue here concerns the circumstances in which a statement made by an accused person may be used in his cross-examination and for the purpose of impeaching his credit.

The accused above-named is facing a charge of murder.

He was arrested on 2 April 1984. He was taken to the Rawang Police Station where he was kept in custody.

On 3 April 1984 ASP Lim Peng Soon recorded a statement from the accused (the statement).

Subsequently there was a preliminary inquiry, in which the prosecution put the statement in evidence.

The accused reserved his defence and the matter was remitted for trial by Jury.

In the High Court the prosecution did not call ASP Lim Peng Soon and did not have the accused's statement admitted in evidence as part of its case.

Indeed they made no reference to the statement whatsoever in the course of the prosecution case.

When the prosecution closed its case ASP Lim Peng Soon was made available to the defence.

After I ordered the accused to enter upon his defence, he elected to give evidence on oath.

In the course of his cross-examination the DPP sought to use the statement to impeach his credit. She claimed that she could do so under s. 113 of Criminal Procedure Code (the Code). Defence Counsel objected on the ground that since the prosecution had already closed its case it could not now call the recording officer to put the statement in.

I took time for consideration and decided that it was not open to the prosecution to do this for the following reasons.

The critical words of s. 113(1) of the Code is that such a statement,

> shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit...

To my mind the sequence of the language is quite clear. If the prosecution wish to rely upon the statement as evidence they must have the statement admitted as part of their case. Then if the accused person, being the person charged himself gives evidence as a witness then his statement which is already in evidence can be used in his cross-examination for the purpose of impeaching his credit.

I am reinforced in my view in that the proviso (a) to s. 113 forbids the use of such a statement unless the statement was voluntary and secondly the Court is satisfied in the case of a statement made by person after his arrest, that a caution in the statutory form was administered to him.

It is self-evident that such satisfaction must be provided to the Court before any attempt is made to have the statement admitted in evidence or used for cross-examination to impeach credit.

Thus to allow the prosecution to utilise the statement for the first time, halfway through the cross-examination, would be to defeat s. 113 of the Code.

The learned DPP claimed that she could initiate a trial within a trial to determine the admissibility of the statement notwithstanding that she had closed her case. With respect this would be to allow her to reopen her case after she had closed it in order to put the statement in evidence as a prosecution exhibit. Inevitably she would have to call the recording officer ASP Lim Peng Soon to give evidence as a witness for the prosecution.

In coming to my decision I have of my own motion considered the following earlier decisions namely *Public Prosecutor v. Mohd Noor bin Jantan* [1979] 2 MLJ 289, *Krishnan & Anor. v. Public Prosecutor* [1982] CLJ (Rep) 152 and *Public Prosecutor v. Samsul Kamar bin Mohd Zain* [1988] 2 CLJ (Rep) 310.

The precise point which arose in the present matter was not dealt with in those cases.

Nor have I lost sight of s. 145 of the Evidence Act. It is not irrelevant to remember that before it was amended there was a total prohibition on the use of accused's statements in the course of police investigation for purposes of impeaching credit. In my view a distinction must still be drawn between an ordinary witness and an accused person. The special provisions made by s. 113 of the Code as regards statements by accused persons made in police custody must be rigidly construed.

I therefore ruled accordingly.

Also found at [1989] 1 CLJ 56